

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

INFINITY CONSTRUCTORS INC.

DECISION OF THE HEARING OFFICER

Appearances: David P. Mooney, Esq., advisor to the claimant
Charla Bizios Stevens, Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid commissions and wages
RSA 275:43 V unpaid employee expenses

Employer: Infinity Constructors Inc., PO Box 1321, North Hampton, NH 03862

Date of Hearing: January 6, 2014 (held open until January 15, 2014)

Case No. 46270

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on July 12, 2013. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on November 25, 2013. The claimant is not able to set an exact amount but he feels it is around the \$20,000.00 figure. The hearing was held open for written closings.

The claimant testified that he worked for the employer for about a year, May of 2010 until May of 2011. He previously worked for the employer for five to six years prior to 2004. The claimant feels that he should be paid commissions on all jobs he brought into the company and paid on jobs even after he ceased employment. The claimant is also seeking payment for employee related expenses incurred during the course of business.

The claimant testified that there was no hiring agreement and that he felt he was working under the same conditions he had worked under in his first tour with the employer. He stated that his salary was always paid but there were problems with the commissions and the employee expenses.

The expenses were turned into the employer and they were for expenditures above the monthly fee. The claimant stated that he was not reimbursed for the \$25.00 per diem and that he had many expenses outside of the monthly stipend of \$750.00. The claimant feels that he is owed for meals in places that would not accept the employer issued American Express Card. He also feels that he is owed tolls paid for in the course of business by the claimant's own personal account. He is seeking \$3,900.00 in unpaid expenses.

The claimant was also hired at asset amount of salary. Salary was set at \$1,000.00 per week which in December of 2010 the weekly salary was reduced to \$650.00 per week. The Wage Claim is not about the salary but about the commission structure. The claimant stated that he was hired and told that he was to work in the same position that he previously held with the company in 2004. He was to get a 3% commission on all jobs sold. He was told that none of the cited jobs made a profit that would allow for the commission to kick into play.

The employer testified that the claimant was offered two different pay plans at the start of his employment. The claimant chose the plan under which he was working. The pay plans were different from the first time the claimant worked for the employer. The company used to be a very large company and it was sold. The employer started up this new business which was smaller than the first company. The claimant worked for both companies.

The company offered a set amount each month for expenses because the employee had to use his/her own vehicle. There was also a company credit card issued for other incidentals. The per diem the claimant is seeking was a benefit with the previous employer and not with this start up company. There is no per diem with the current company.

Under the new pay structure the commission was based on Gross Profit after 30% profit was reached. In his employment with the previous company the claimant did receive a pay out at the end of his employment. This payout was based on different circumstances and a different company. The new formula for the claimant was not met during this employment period.

The employer also stated that any time an employee spent over their allotment in a business expense, the employee was paid upon the report of this expense. The claimant never pursued any repayment of expenses, beyond the monthly assessment, while working for the company. The employer said that all the expenses were reported after the claimant left the service of the employer. The employer felt that if the claimant used his own money, it would be reported to the employer in a matter of days. This did not happen.

The employer stated that the \$200.00 for a phone line may be a reasonable expense because the claimant needed the phone line while traveling for the company. The rest of the submitted expenses were difficult to figure out and assign them a cost to the company.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This section of the law mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275 42 III The term “wages” means compensation, including hourly health and welfare, and pension fund contributions required pursuant to a health and welfare trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of an employee and agreed to by his employer, for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, **commission** or other basis of calculation.

This part of the law places commissions into the category of wages when the commissions are due and owing.

RSA 275:43 V. Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This section of the law places an issue, such as employee expenses, into the category of wages when the expenses are due and owing.

It is the finding of the Hearing Officer, based on the submissions and the testimony presented for the hearing, that the Wage Claim is valid in part and invalid in part. The claimant has the burden to show that there are wages due and owing and he met this burden in the area of expenses.

The claimant seemed to carry over wages and benefits from his previous service with the employer. He now works for a different company with different benefits. The claimant cites a per diem pay structure and is seeking wages for this. The employer was credible in the testimony that this was a benefit at the previous time of employment and had not been in place since 2004.

The employer testified credibly that the claimant had two wage and benefit packages to choose from as his wage and benefit package. The claimant chose the one he worked under and it is found that he was paid correctly under the selected plan.

The claimant had a benefit package to use monthly while he was employed. He worked under this package and only at the end of his employment did he seek payment for items, he says, were beyond the benefit package. The employer did find an expense for a phone line the claimant needed and was not paid for in the course of his employment.

The claimant did not bear his burden to show that there were wages due and owing. The claimant seemed to incorporate benefits from his previous tenure with the company into his current term of employment.

It is found that the employer, through their own admission, owed for the phone line the claimant needed. All other issues in the Wage Claim are invalid.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Hearing Officer finds that the claimant proved that he was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$200.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$200.00, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: February 11, 2014

Original: Claimant
cc: Employer

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